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Reasonable Reliance and Apparent Authority:

East Asia Company Ltd v PT Satria Tirtatama Energindo

[2019] UKPC 30

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Abstract

The Privy Council in *East Asia Company Ltd v PT Satria Tirtatama Energindo* (a case on appeal from Bermuda) has provided clarification on the correct approach to the reliance aspect of apparent authority. Reliance can be of particular importance where the third party has been put on notice as to the agent's lack of authority: e.g. when the transaction is unusual or especially onerous for the principal. The Privy Council concluded, albeit *obiter*, that the correct test is one of reasonable reliance by the third party. In doing so, it has rejected the approach adopted by Lord Neuberger NPJ in the Hong Kong case of *Akai Holdings* and subsequently followed in a number of English decisions: i.e. reliance by the third party is presumed in the absence of dishonesty or irrationality.

Keywords

agency, apparent authority, reliance, company directors

Introduction

Apparent authority, a doctrine within agency law, can be of considerable importance to company and commercial lawyers. A company necessarily acts through its agents, while a

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principal's obligation to honour a contract may turn on the nature and extent of the authority with which its agent acts. Actual authority, whether express or implied, is concerned with the relationship between principal and agent. Apparent authority, by contrast, is about the relationship between principal and the third party dealing with the principal via the agent. It has been said that apparent authority involves a 'a form of estoppel'[1] as it is constituted by a representation as to the agent's authority from principal to third party and reliance on that the representation by the third party. And as with the application of many, if not most, legal rules, where there is a dispute over an agent's authority there can only be one winner: either the third party is entitled to hold the principal to the contract, or the principal is relieved of obligations under the alleged contract. The law on apparent authority presents a challenge for courts as they seek to strike a balance between the interests of principal and third party, while maintaining coherence and predictability in the way the relevant legal rules are formulated and applied. Appellate decisions in a number of common law jurisdictions have, in recent years, made important contributions to the development of this area of the law.[2] *East Asia Company Ltd v PT Satria Tirtatama Energindo* ('*EACL v PT Satria*'), a Privy Council case on appeal from Bermuda, is the latest of those contributions.[3]

Facts

East Asia Company Ltd ('EACL'), a Bermudan company, was the owner of the entire share capital in another Bermudan company, Bali Energy Ltd ('BEL'). BEL, which had been in financial difficulties for a number of years, owned the rights to develop a geothermal energy

[1] *Rama Corp Ltd v Proved Tin & General Investments Ltd* [1952] 2 QB 147, 149 (Slade J).
[2] Most notably: *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 (England); *Thanakarn Kasikorn Thai Chamkat (Mahachno) v Akai Holdings Ltd (No 2)* [2010] HKCFA 63, (2010) 13 HKCFAR 479 (Hong Kong); *Skandinaviska Enskilda Banken AB v Asia-Pacific Breweries (Singapore) Pte Ltd* [2011] SGCA 22, [2011] 3 SLR 540 (Singapore); *Kelly v Fraser* [2012] UKPC 25, [2013] 1 AC 450 (Privy Council, Jamaica).
[3] [2019] UKPC 30.

site in Bali and was EACL's sole asset. Two of EACL's directors, Mr Joenoes and Mr Hata, were also directors of BEL and were responsible for the day-to-day running of BEL. At the end of 2014, PT Satria Tirtatama Energindo ('PT Satria'), an Indonesian company, made contact with BEL with a view to purchasing the company. PT Satria had previously conducted due diligence into BEL. Following this contact from PT Satria, there followed a flurry of activity at board level within EACL and BEL, with Mr Joenoes and Mr Hata attempting to remove other directors and pass various resolutions. Three key events were as follows. First, on 27 February 2015 EACL and PT Satria purported to execute a heads of agreement document ('HOA') in relation to the sale of BEL to PT Satria, with Mr Joenoes signing on behalf of EACL. Second, on 1 March 2015 Mr Joenoes and Mr Hata held a board meeting of EACL at which they passed a resolution supposedly approving the sale of BEL to PT Satria. The minutes of that meeting did not, however, refer to the HOA or to the benefits that would accrue to Mr Joenoes and Mr Hata as a result of the transaction. Third, also on 1 March 2015, Mr Joenoes signed a share transfer document on behalf of EACL.

The other directors of EACL attempted to disclaim the sale of BEL to PT Satria, with Mr Joenoes and Mr Hata also removed as directors of EACL and BEL on 4 March 2015. The boards of EACL and BEL also passed unanimous resolutions rejecting the purported transfer of shares in BEL as being 'invalid, null and void'. PT Satria then sought rectification of BEL's register of members pursuant to the Bermuda Companies Act 1981. The judge at first instance held that EACL was bound by the transaction and made the order for rectification sought by PT Satria.[4] That decision was subsequently overturned by the Court of Appeal of Bermuda.[5]

[4] *PT Satria Tirtatama Energindo v East Asia Company Ltd and another* [2016] SC (Bda) 90 Com.
[5] *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2016] CA (Bda) 20 Civ.

The decision of the Privy Council

PT Satria appealed to the Privy Council. Its appeal was dismissed (Lord Kitchin delivering the opinion of the Privy Council) for the central reason that Mr Joenoes lacked authority to act on behalf of EACL in relation to the transaction.[6] By the time the case reached the Privy Council, PT Satria had abandoned any attempt to claim that Mr Joenoes had been acting with actual authority. Although the company's constitution allowed the board to appoint a managing director and delegate powers to that person, Mr Joenoes had never been appointed to that position. The core issue in the case before the Privy Council was, therefore, apparent authority: i.e. whether Mr Joenoes had been acting with apparent authority when executing the HOA.

The Privy Council, in agreement with the Court of Appeal of Bermuda, held that Mr Joenoes lacked the apparent authority for which PT Satria had been contending. There were a number of reasons given for that conclusion, but two are of particular importance. First, there was the extraordinary nature of the transaction. Although Mr Joenoes and Mr Hata carried on the day-to-day running of EACL and BEL, there was nothing to suggest that they had been authorised to sell EACL's sole asset.[7] That point was especially relevant given that both men stood to benefit financially from the transaction. Second was the absence of any resolution or minute indicating that Mr Joenoes had authority to execute the HOA on EACL's behalf. Nor was there a declaration of interest by Mr Joenoes or Mr Hata as to the benefits that would have accrued to them.[8] The facts, therefore, led to the conclusion there had been no representation from EACL to PT Satria that Mr Joenoes had authority to transfer of shares in BEL. It was, moreover, held that the transaction was avoidable by EACL and that BEL had refused to register the transfer within the three-month period allowed by the relevant Bermudan

[6] *EACL v PT Satria* (n 3), paras 39–69, especially paras 65 and 66.
[7] Ibid, para 58.
[8] Ibid, para 60.

legislation.[9] That said, the most noteworthy aspect of the Privy Council's opinion is the *obiter* passage on the question of reliance by the third party.[10]

The rejection of *Akai Holdings*

Given the Privy Council's conclusion that EACL had not made the representation (for which PT Satria was contending) in relation to the authority of Mr Joenoes, the question of reliance by PT Satria fell away as a live issue. If, however, the opposite conclusion had been reached it would have been necessary to consider the following question: was PT Satria entitled to rely on the representation from EACL if it had been put on notice as to the agent's lack of authority? The parties had made submissions on that point and the Privy Council thought it would be 'helpful to state [its] view'.[11] In doing so, the Privy Council chose to address the controversial approach taken by Lord Neuberger (sitting as a non-permanent judge of Hong Kong's Court of Final Appeal) in the *Akai Holdings* case.[12] There Lord Neuberger had decided that where the principal has represented the agent has the relevant authority the third party is, in the absence of irrationality or dishonesty, entitled to rely on the representation.[13] In effect, Lord Neuberger was saying that the question to ask was whether the third party had acted irrationally or dishonestly by relying on the representation as to the agent's apparent authority rather than whether it had acted (un)reasonably. Although Lord Neuberger had queried whether there would in practice be much different between the two approaches,[14] the Court of Appeal of Bermuda did reach different conclusions when applying the alternative tests to the facts of *EACL v PT Satria*.[15] If the *Akai Holdings* approach had been the correct test as a matter of

[9] Ibid, paras 96–109.
[10] Ibid, paras 70–95.
[11] Ibid, para 74.
[12] *Akai Holdings* (n 2), paras 49–62.
[13] Ibid, paras 62 and 75.
[14] Ibid, para 50.
[15] *EACL v PT Satria* (n 5), para 136.

Bermudan law, PT Satria would have succeeded on the reliance point for the following reason. Clarke JA was 'not persuaded that we should find that PT Satria or Mr Suhardono did not honestly believe that Joenoes had such authority or that such a belief was irrational, reckless or involved turning a blind eye'[16]

Having considered a number of authorities relevant to the matter, the Privy Council rejected the *Akai Holdings* approach to reliance, which it considered out of step with those authorities. It disagreed with Lord Neuberger's attempt to distinguish a number of authorities considered in *Akai Holdings*.[17] Had the reliance issue been a live one, the Privy Council would have addressed it as follows: 'PT Satria could not rely upon the apparent authority of [the agent] if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify that he had that authority.'[18] The Privy Council has, therefore, confirmed that the correct approach should be a test of reasonableness. As cases such as *EACL v PT Satria* indicate, the reasonableness of the third party's reliance can assume particular importance where the agent is attempting to commit the principal to a transaction that is unusual or which may be contrary to the interests of the principal.

Comment

The most obvious point to make is that the Privy Council applied the principles relevant to the representation aspect of apparent authority in an uncontroversial manner. Before the Privy Council there was no attempt to rely on *Kelly v Fraser*[19] by alleging that Mr Joenoes, even if lacking apparent authority to conclude the transaction, nevertheless had apparent authority to communicate the approval of EACL's board of directors.[20] PT Satria's claim that Mr Joenoes

[16] Ibid, para 133.
[17] *EACL v PT Satria* (n 3), para 90–92.
[18] Ibid, para 93.
[19] *Kelly v Fraser* (n 2).
[20] *EACL v PT Satria* (n 3), para 61.

was acting with apparent authority was addressed on the basis of a traditional understanding of the law. Although the discussion of reliance by the third party was *obiter*, it is that aspect of the Privy Council's decision that will be of most interest and the most likely reason for citing the case in the future. There are, it is suggested, several reasons why rejection of the *Akai Holdings* approach to reliance was the correct decision.

The first is the weight of authority supporting reasonable reliance as the correct approach. In particular, Lord Neuberger's attempt to distinguish the constructive notice cases and to align apparent authority with misrepresentation does not find support in the case law.[21] Second, reasonable reliance as the appropriate test has a much better fit as a matter of principle and consistency. Within private law, especially the law of obligations, reasonableness is the usual approach. Remoteness of damage is assessed on the basis of reasonable foreseeability, contractual provisions are interpreted from the stance of the reasonable person, breach of a common law duty of care (i.e. negligence liability) is concerned with what the reasonable person would have done or refrained from doing, and so on. Moreover, as noted in *Bowstead & Reynolds on Agency*, two related enquiries are assessed according to a test of reasonableness (Watts and Reynolds, 2018: 8.50) One is the question of contractual formation according to the standard rules on offer and acceptance. The other is the representation from principal to third party that comes prior to the question of reliance. Given the widespread use of reasonableness as the relevant test (including its relevance to related enquiries), it would be odd if a third party's attempt to rely on the principal's representation was not judged from the same perspective.

Third, observing that the approach taken in *Akai Holdings* is premised, in part at least, on a distinction between what is reasonable and what may be rational but unreasonable, one

[21] Ibid, paras 76–92.

might question whether such a distinction is tenable in the first place. Indeed, on one view reasonableness and rationality are identical: 'Properly understood, rationality … is exactly the same as reasonableness.' (Gardner and Macklem, 2004: 474). While an analysis of that distinction, or lack thereof, is beyond the scope of this short piece, the reference to irrationality in *Akai Holdings* is, I suggest, unhelpful for another reason. Business people, at least according to what one reads in the law reports, tend not to act irrationally. They may act for good reasons or bad reasons, honestly or dishonestly, in good faith or in bad faith, but rarely irrationally. Indeed, if someone is acting in a genuinely irrational manner, we might be prompted to call into question their capacity to enter into contracts or otherwise handle their own affairs. Their ability to continue acting as a company director could even be challenged.[22]

Fourth, there is a burden of proof question raised by *Akai Holdings*. In *Akai Holdings* Lord Neuberger acknowledged that 'the third party must establish that it relied on the apparent authority of the alleged agent', but was concerned about 'placing too high a hurdle for third parties seeking to establish a claim in apparent authority.'[23] He then went on to say the following:

> In my view, once a third party has established that the alleged agent had apparent authority, i.e. that the principal held out the alleged agent as having authority to bind the principal, and that the third party has entered into a contract with the alleged agent on behalf of the principal, then, *in the absence of any evidence or indication to the contrary, it would be an unusual case where reliance was not presumed*.[24]

[22] See e.g. Companies (Model Articles) Regulations 2008 SI 2008/3229, Sch 2, para 18(e). See also *Re CEM Connections Ltd* [2000] BCC 917 where it was held that an individual, in the context of mental illness and illicit drug use, had not given valid consent to their appointment as a director.
[23] *Akai Holdings* (n 2), paras 72, 74.
[24] Ibid, para 75 (emphasis added).

If reliance is to be presumed in the absence of irrationality or dishonesty, there is an arguable case for saying (even if *de facto* rather than *de jure*) the burden of proof would be on the principal to demonstrate the third party's irrationality or dishonesty in order to rebut the presumption of reliance. A test of reasonable reliance, on the other hand, suggests that it is the third party, as the party seeking to enforce the contract, who bears the burden of proving that its reliance was reasonable. The latter approach is, once again, more consistent with related legal enquiries and private law more generally.

Fifth, we can observe the rationale given by Steyn LJ (as he then was) in *First Energy (UK) Ltd v Hungarian International Bank Ltd* as underpinning the decision in that case and more generally pervading the law of contract: 'the reasonable expectations of honest men must be protected.'[25] Apparent authority can involve a delicate balance between the interests of the principal (attempting to deny contractual liability) and the third party (seeking to hold the principal to the alleged contract). While the principal's representation will usually concern an agent's authority to conclude the transaction on behalf of the principal, the decision in *First Energy* (now bolstered by *Kelly v Fraser*) recognises that, in certain circumstances, the principal may represent that the agent has authority to communicate the principal's approval. *First Energy*, in expanding what might count as a representation from principal to third party, tips the balance in favour of third parties, a point on which supporters and detractors of the decision would be likely to agree. If a third party is able to take advantage of a more relaxed approach towards the principal's representation, and if that approach is supposedly underpinned by 'the reasonable expectations of honest men', it is not unfair to require that the third party's reliance on the representation be subjected to a test of reasonableness.

[25] *First Energy* (n 2) 196

In the years since *Akai Holdings*, Lord Neuberger's approach to reliance has been followed in a number of English cases,[26] including the Court of Appeal's decision in *Quinn v CC Automotive Group Ltd*.[27] Decisions of the Privy Council are not strictly binding in the English courts, albeit that they are, in general, treated as highly persuasive. And although the Privy Council is entitled to state explicitly that its decision in a particular case represents the English legal position,[28] there is no such direction in *EACL v PT Satria*. Having said that, Lord Kitchin's examination of relevant authorities suggests that those English decisions which have followed *Akai Holdings* on the reliance point have done so in error. The *Akai Holdings* approach should therefore be rejected as a matter English law, not because the Privy Council has said so explicitly but because the analysis of relevant authorities in *EACL v PT Satria* indicates that *Akai Holdings* is out of step with the English precedent. When a suitable opportunity arises in Hong Kong, there will no doubt be an attempt to persuade the courts in that jurisdiction to reconsider the reliance question. English lawyers will be aware that, within the jurisdictions of the UK, where the principal is a company the common law rules on apparent authority must be read in the light of statutory provisions, currently contained in the Companies Act 2006, that abolish the *ultra vires* and constructive notice doctrines.[29] Section 40(1) says that: 'In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.' Although the scope of the protection afforded by s 40 is a moot point (Watts and Reynolds, 2018: 8.37), the question of reasonable reliance by a third party is still likely to be of some importance where, as in *EACL v PT Satria*, a company director acts beyond his or her usual authority.

[26] *EACL v PT Satria* (n 3), para 84.
[27] [2010] EWCA Civ 1412, [2011] 2 All ER (Comm) 584.
[28] *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843, para 21 (Lord Neuberger).
[29] There are no equivalent statutory provisions in Bermuda: *EACL v PT Satria* (n 5), para 129 (Clarke JA).

There is a final point to make. Although Lord Sumption retired from the UK Supreme Court in December 2018, at the time *EACL v PT Satria* was decided he was, along with Lord Neuberger, on the Supplementary Panels for both the Supreme Court and the Judicial Committee of the Privy Council. Given his contributions to this area of the law, it is a pity he was not part of the Board for *EACL v PT Satria*. In the earlier Privy Council case of *Kelly v Fraser* Lord Sumption sought to explain the ambit of *First Energy* and its relationship to *Armagas v Mundogas*, a key House of Lords' decision on apparent authority.[30] In *Akai Holdings*, as Jonathan Sumption QC and counsel for one of the parties, he was the one who had argued successfully before Lord Neuberger that, in the context of apparent authority, the focus should not be the reasonableness of the third party's conduct but rather the absence of irrationality or dishonesty. Had Lord Sumption been part of the panel for *EACL v PT Satria* it would have been interesting to see whether he had experienced a change of heart. Likewise, with Lord Neuberger.

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References

[30] *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717.

John Gardner and Timothy Macklem, ‘Reasons’ in Jules Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004).

Peter Watts and FMB Reynolds (eds), *Bowstead & Reynolds on Agency* (21st edn, mainwork incorporating first supplement, Sweet & Maxwell 2018).